No. 96-1577

In The

Supreme Court of the United States

October Term, 1997

STATE OF ALASKA,

Petitioner,

vs.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE INDIAN LAW PROFESSORS IN SUPPORT OF AFFIRMANCE

RICHARD B. COLLINS
Associate Dean and
Professor of Law
DAVID H. GETCHES
Raphael J. Moses
Professor of Law
CHARLES F. WILKINSON
Moses Lasky
Professor of Law
School of Law
University of Colorado
Boulder, Colorado 80309-0401
303-492-7377

ROBERT N. CLINTON
Wiley B. Rutledge
Professor of Law
College of Law
University of Iowa
Iowa City, Iowa 52242
319-335-9032

CAROLE E. GOLDBERG*
Professor of Law
School of Law
University of California, Los Angeles
Los Angeles, California 90095
310-825-4429

RALPH W. JOHNSON
Professor of Law
School of Law
University of Washington
Seattle, Washington 98105
206-543-4938

MONROE E. PRICE
Professor of Law
Benjamin N. Cardozo
School of Law
Yeshiva University
New York, New York 10003
212-790-0402

RENNARD STRICKLAND
Dean and Professor of Law
School of Law
University of Oregon
Eugene, Oregon 97403
541-346-3853

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICI[1]

Amici Dean Rennard Strickland, Charles F. Wilkinson, Richard B. Collins, Carole E. Goldberg, Robert N. Clinton, David H. Getches, Ralph W. Johnson, and Monroe Price are full-time professors of law specializing in Indian law. All are authors and members of the editorial board of *Felix S. Cohen's Handbook of Federal Indian Law* 1982 edition (Michie Bobbs-Merrill) [hereinafter *Cohen*] as well as other books and articles in the field.

Our interest in this case is in maintaining the coherence of Indian law and the integrity of long-tested principles in that field. Following in the tradition of Felix Cohen's 1941 edition, the 1982 edition of the *Cohen* treatise sought to compile and explain the treaties, statutes, and constitutional provisions governing the relationship between the United States and native North American tribes. From this material the treatise has distilled fundamental and enduring principles.

We are concerned that the State of Alaska's brief in this case, relying heavily on an unpublished interpretation by an Interior Solicitor, charts a course for the Court that departs significantly from these enduring principles. Compounding our concern, the State fails to indicate to the Court how radical this departure would be. The State

---

[1] Counsel for the State of Alaska and the Village of Venetie have consented to the filing of this brief; letters of consent have been filed with the Clerk. Amici certify pursuant to Rule 37(6) that no part of this brief was authored by counsel for a party or any person other than one of the named amici curiae. No person other than amici curiae made a monetary contribution to the preparation or submission of this brief.

would have the Court abandon a distinctive framework for addressing questions of statutory interpretation in Indian law cases – a framework that demands a clear statement of Congress to alter the status of tribes in their relationship with the United States.

The most basic of tribal powers – the power to regulate conduct within the tribal territory – is at stake. The particular dispute before the Court involves the taxation of a non-Indian business building a school for Natives on tribal land, but any resolution of the case will dictate the extent to which the tribe can regulate its own members as well. The foundational principles of federal Indian law were developed for just such controversies.

The 1982 edition of the *Cohen* treatise sets forth these principles, and we summarize them in our argument. Nothing in the more recent jurisprudence of the Court has altered the principles applicable to this case.

SUMMARY OF ARGUMENT

A century and one-half of Indian law jurisprudence provides unique protections for the property and self-government of a small minority group against the overwhelming but indisputable power of the federal government. A cardinal principle of that law must be applied here to insist that Congress speak with clarity if it intends to extinguish the self-government of the Venetie Tribal Government. The tribe's former reservation, title to which was converted from trust to fee pursuant to the Alaska Native Claims Settlement Act (ANCSA), is still held for and occupied by the tribal members of Venetie.

As such, it continues to meet the statutory definition of "Indian country." Nothing in ANCSA states an intention otherwise. Indeed, every expression of Congress prior to and since that Act, from Public Law 280 in 1958 through ANCSA's amendments, treats tribal self-government of the village as if it were intact.

ARGUMENT

I. TRIBAL SELF-GOVERNMENT MAY BE ALTERED ONLY BY A CLEAR AND SPECIFIC STATEMENT OF CONGRESS

Tribal self-government is genuinely and visibly at stake in this case. Venetie is a remote and isolated village above the Arctic Circle, inhabited entirely by tribal members and a few professionals who serve them. All of the land is owned by the tribe, and nearly all of the services available locally to inhabitants are provided by the tribe or by the federal government under programs developed specifically for Indians. *State of Alaska* ex rel. *Yukon Flats School Dist. v. Native Village of Venetie Tribal Government*, 1995 U.S. Dis. LEXIS 11039, 11044-46 (D. Alas. Aug. 2, 1995). Venetie is thus as "Indian" a place as one can imagine, and certainly more distinctly Indian than many reservations in other parts of the United States. Tribal self-government is essential if Venetie is to be able to sustain its own way of life.

One of the most fundamental principles of Indian law is that tribal powers of self-government may be extinguished only by a clear and specific expression of Congress. The 1982 edition of the *Cohen* treatise twice articulated this principle:

> Once powers of tribal self-government or other Indian rights are shown to exist, by treaty or otherwise, later federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights. The principle of a "clear and plain statement" before Indian treaty rights can be abrogated also applies in nontreaty contexts. . . . The canons are variously phrased in different contexts, but generally they provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited.

Cohen, supra at 224-25 (footnotes omitted).

> Before holding that treaties or statutes limit tribal powers . . . the courts have insisted upon a clear and specific expression of congressional intent to extinguish traditional prerogatives of sovereignty.

Cohen, supra at 242 (footnotes omitted).

This principle has been applied in cases construing congressional delegation of jurisdiction over Indians to states, *Bryan v. Itasca County*, 426 U.S. 373 (1976); in cases construing federal laws directly limiting exercises of tribal sovereignty, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); and in cases construing congressional acts that arguably contract the territorial basis for tribal sovereignty (i.e., Indian country), *Solem v. Bartlett*, 465 U.S. 463

(1984). In each instance, the Court has required either an express statement in the statutory text or some unmistakable indication from the circumstances surrounding the enactment before it would allow tribal self-government to be diminished. When there was ambiguity or uncertainty regarding congressional intent, the principle dictated, and the Court insisted, that tribal self-government remain intact.

In applying the requirement of a clear and specific statement, it is not enough to identify the more persuasive rendering of Congress's intent between two competing versions. Under this incorrect approach, the principle of clear and plain expression would function only as a "tie-breaker" in the event the Court could not find one version more persuasive than the other. Rather, more like the burden of persuasion in criminal cases, the Court must determine whether there is any reasonable basis for doubting that Congress intended to extinguish tribal self-government. If any reasonable doubt exists, then the principle requires that tribal sovereignty be upheld. Thus, when this Court has been confronted with constructions of statutes and treaties that would effectively "reverse the general policy of the government towards the Indians," it has said that "[t]o justify such a departure . . . requires a clear expression of the intention of Congress. . . . " *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883).

The principle of clear and specific expression, and the cases that apply it, "reflect a pervasive influence of (a) the tradition of federal policy to encourage the development and exercise of tribal self-governing powers and (b) the assumed federal obligation to preserve and protect those powers." *Cohen, supra* at 242-43. Since publication

of the 1982 edition of the *Cohen* treatise, this policy and the associated federal responsibility have been more widely and fully elaborated than at any time since the early treaty period of United States-tribal relations. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7601(d), 7602(r) (tribes treated as states); Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 450n, 450aa note, 450aa-450gg (extending and making permanent systems for tribal control over federally-funded services to tribes); Defense Appropriations Act for FY 91, Pub. L. No. 101-511, § 8077(b)-(d) (1990) amending 25 U.S.C. § 1301(2) (affirming tribal criminal jurisdiction over non-member Indians), *see* 25 U.S.C.A. § 1301 and note (Supp. 1997); Office of the Administrator, United States Environmental Protection Agency, *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984) (recognizing tribes as governments responsible for making decisions and carrying out program responsibilities affecting reservations). Thus the historical and doctrinal foundations for the principle remain secure.

The normative basis for the principle of clear and specific expression is found in fundamental works of Anglo-American political theory and finds full expression in the United States Constitution. This theory makes political legitimacy turn on "the consent of the governed." *See* John H. Ely, *Democracy and Distrust* (1980); Richard Collins, *Indian Consent to American Government*, 31 Ariz. L. Rev. 365 (1989). When Congress exercises its broad constitutional power over Indian affairs,[2] the legitimacy of its action is questionable under any theory

[2] *See Cohen, supra* at 207, for an explanation of this power.

requiring consent of the governed. Under this circumstance, the principle of clear and specific expression operates to moderate federal incursions into tribal sovereignty, while maintaining Congress's ultimately broad power.

In this case, the Court is asked to construe two federal statutes: the 1948 Indian country statute, 18 U.S.C. § 1151, and the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. §§ 1601-1628, as amended. The principle of clear and specific expression provides a distinct framework for interpreting both of these statutes and their interrelationship.

II. THE INDIAN COUNTRY STATUTE COVERS THE LAND OF THE VENETIE TRIBE

The Indian country statute identifies geographic areas where tribes retain governmental authority. This statute includes "reservations" (§ 1151(a)), "dependent Indian communities" (§ 1151(b)), and "allotments" (§ 1151(c)). The statute codified, in broad and comprehensive terms, prior judicial interpretations of the territory within which federal policy protects tribal self-government. As this Court recently stated:

> Congress has defined Indian country broadly. . . . F. Cohen, Handbook of Federal Indian Law 34 (1982 ed.) ("[T]he intent of Congress, as elucidated by [Supreme Court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments.").

Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123, 125 (1993).

At issue in this case is whether former reservation land held in fee by an Alaska Native village, which is a federally recognized tribe, and inhabited by its members constitutes a "dependent Indian community" within the meaning of the Indian country statute. The State of Alaska argues that this land qualifies as a "dependent Indian community" only if Congress expressly designates it as such. Pet. Brief at 20. Yet the applicability of Indian law to Alaska and Alaska Natives and, but for a few aberrational lower court decisions, the existence of Indian country in Alaska have continued from earliest times. As Felix Cohen wrote in 1941,

> The legal position of the individual Alaskan natives has been generally assimilated to that of the Indians of the United States. It is now substantially established that they occupy the same relation to the Federal Government as do the Indians residing in the United States; that they, their property, and their affairs are under the protection of the Federal Government; . . . and that the laws of the United States with respect to the Indians resident within the boundaries of the United States proper are generally applicable to the Alaskan natives.

Felix S. Cohen, *Handbook of Federal Indian Law* 404 (1941) [hereinafter *1941 Cohen*].

When doubts arose about administration of justice in Alaska in 1958, Congress acted to extend Public Law 280 (and hence a large measure of state jurisdiction) over Alaska, a law that specifically refers to Indian country

and continues in force in the state. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a); *Cohen, supra* at 764. The state now contests an exercise of the tribe's residual jurisdiction to tax and regulate that survived Public Law 280. *See Cohen, supra* at 362-368.

Not only does the State of Alaska's view of the Indian country statute overlook the historic federal treatment of Alaska Native villages, it thoroughly disregards the principle of clear and specific expression. No language in the Indian country statute expressly requires affirmative congressional designation of "dependent Indian communities." Furthermore, the earlier decisions of this Court that Congress codified in the Indian country statute, especially *United States v. Sandoval*, 231 U.S. 28 (1913), did not insist that Congress make such a designation.

At the time *Sandoval* was decided, there was no statutory definition of Indian country, though many statutes depended on the concept. This Court and lower federal courts necessarily undertook to define Indian country on a case-by-case basis. The result was extremely uneven. Decisions varied from the practical to the highly technical. For a fine distinction, compare *Clairmont v. United States*, 225 U.S. 551 (1912) (right-of-way across tribal land not Indian country because Indian title fully extinguished), with *United States v. Soldana*, 246 U.S. 530 (1918) (similar right-of-way was Indian country because an easement with underlying tribal fee). Congress in 1948 resolved every conflict created by these decisions in favor of the more expansive definition of Indian country.

The New Mexico history is particularly instructive. The territorial federal courts had taken upon themselves the decision that members of the Pueblo tribes were not really Indians because they were too "civilized." So their lands were not Indian country and were ineligible for federal protection from encroaching settlers (who, of course, were the ones making this argument to the courts). Although this reading did great violence to statutory language, this Court unfortunately accepted it in *United States v. Joseph*, 94 U.S. 614 (1877). Eventually, Congress had to specify that this had been an error, and the Court sustained the congressional judgment in *Sandoval*, admitting that the Court's description in *Joseph* had been "based upon statements in the opinion of the territorial court . . . which are at variance with other recognized sources of information." 231 U.S. at 49. But this left an enormous legal quagmire about the competing rights of the tribes and encroaching settlers, which was resolved at great expense under the Pueblo Lands Act of 1924. *See 1941 Cohen, supra* at 385-93.

In many instances, local non-Indians who have found federal protection of Native Americans to be an obstacle to their interests have asserted technical readings of Indian legislation to reduce or eliminate that protection. In some instances, the courts have succumbed. Congress in 1948 rejected these efforts in defining the scope of Indian country. Alaska now attempts another such claim. It should be rejected because Congress intended otherwise, and because past wanderings of judicial attention from congressional will have been disastrous.

The 1982 *Cohen* treatise provides a reading of the "dependent Indian community" language of the Indian

country statute that accords with the principle of clear and specific expression:

> Read together, 18 U.S.C. §§ 1151(a) and (b) employ a functional definition focusing on the federal purpose in recognizing or establishing a reasonably distinct location for the residence of tribal Indians under federal protection.

Cohen, supra at 39. This reading relies on Congress to provide some reasonable delineation of the territory where federal protections apply, without requiring any specific designation of Indian country status. Thus, the many federal statutes designating Alaska Native village lands and village corporation lands as the site of special jurisdictional arrangements (*see, e.g.*, Indian Child Welfare Act, 25 U.S.C. § 3202(9); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601(36), 9626) and eligibility for federal Indian benefits (*see, e.g.*, Tribally Controlled Community College Assistance Act, 25 U.S.C. § 1801; Native American Programs Act of 1974, as amended, 42 U.S.C. § 2991 et seq.) supply all that is required to identify the existence of a "dependent Indian community."

Applying this analysis to Alaska, the 1982 *Cohen* treatise concludes,

> As long as the indicia of dependence exist and Native people continue to reside together in a reasonably distinct location recognized as their residence by the federal government, they should be considered "dependent Indian communities." The authority of a traditional or IRA government over an area does not depend on ownership of land within the area by the tribal

> government itself. Indeed, the statutory definition of Indian country was intended to eliminate reliance on land titles in these matters. Boundaries created for other purposes, however, may be useful in showing the minimum area to be considered the domain of a dependent Indian community. These areas include lands that are patented to Native corporations, owned by tribal governments, located within former reservations, and located within Native villages which are municipalities, so long as they remain part of Native communities.

Cohen, supra at 766-67.

In contrast, the interpretation of the Indian country statute that the State of Alaska proposes would abrogate powers of tribal self-government that existed before the enactment of that statute. Such a reading directly contravenes the principle of clear and specific expression, which resolves ambiguities and uncertainties in favor of the preservation of tribal sovereignty. Given the silence of the statute itself and the broad intent of the 1948 codifiers, there is no basis for introducing a requirement that Congress specifically designate territory as Indian country.

III. ANCSA CANNOT BE CONSTRUED TO EXTINGUISH TRIBAL SELF-GOVERNMENT IN THE VILLAGE OF VENETIE

The second statute that the Court is asked to construe in this case is ANCSA. ANCSA resolved land claims through cash payments and by transferring territory in fee to village and regional corporations organized under

state law, yet subject to substantial federal regulation and restrictions. Tribal governments remain intact with continuing importance in the Native self-governance of villages. *See Cohen, supra* at 765. The State of Alaska, however, contends that ANCSA extinguished Indian country in that state. According to the principle of clear and specific expression, it is the State's burden to demonstrate Congress's unmistakable intent to abrogate tribal self-government.

1. Revocation of the Venetie Reserve Converted Land Tenure But Did Not Extinguish Venetie Self-Government or Indian Country

It is uncontroverted that Indian country existed in Alaska before ANCSA. Pet. App. 67a. ANCSA is devoid of language expressly extinguishing tribal jurisdiction or Indian country. Moreover, recognizing the continuing controversy inherent in the governance issue, Congress chose to avoid the question, leaving undisturbed the status quo ante as to tribal governance in Alaska villages when it mandated in 1987 amendments to the Act that the legislation should not be construed as determining whether any federally recognized tribe "has or does not have governmental authority over lands . . . or persons . . . . or that Indian country exists or does not exist within the . . . state of Alaska." 43 U.S.C.A. § 1601 note (Supp. 1997).

Lands held for Natives in Alaska took on a unique form of tenure after ANCSA, but that did not change Venetie's right of self-government. Under § 19 of ANCSA, most reserves were "revoked," extinguishing the trust

title of the lands. 43 U.S.C. § 1618; *Cohen, supra* at 747. Villages then took title to lands in one of two ways: 1) Most villages received land rights through newly-formed corporations that took fee title to lands (possibly including former reserve lands) selected pursuant to other provisions of the Act – with surface rights held by a village corporation and subsurface rights held by a regional corporation; 2) For a handful of villages, including Venetie, reserves could be continued in an altered form of ownership, with fee title to both surface and subsurface of lands in "any reserve set aside for its members or stockholders prior to" ANCSA to be held by the land-holding corporation set up for that village. *See* 43 U.S.C. § 1618(b). Venetie made this election at considerable cost; accepting its former reserve lands required stockholders to relinquish eligibility to select additional lands from the 40 million acres of public lands made available to Natives under ANCSA, to receive funds distributed by regional corporations, or to be issued stock in a regional corporation.

All that changed for Venetie with the enactment of ANCSA was the title to its land. It was no longer denominated a "reserve" held in trust by the United States. The very same lands were held and managed by a special corporation whose creation was mandated by Act of Congress. As this Court recently said, "the test for determining whether land is Indian country does not turn upon whether the land is denominated 'trust land' or 'reservation'" so long as it has been "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (non-

reservation trust land), citing and quoting *United States v. John*, 437 U.S. 634, 648-649 (1978) (purchased lands later declared to be in trust for certain resident Choctaws), and *United States v. McGowan*, 302 U.S. 535, 539 (1938) (lands purchased for Indians in Nevada).

Thus, ANCSA did not alter the practical relationship of Venetie members to their land, other than effecting a release from federal controls associated with trust title. Under the terms of the statute, the land went from reservation status to ownership by the Native village corporation controlled by tribal members, to ownership by the tribal government itself. 43 U.S.C. § 1618(b). Congress did not specify that the former reservation lands should be restored to or denominated public domain, as it had done in many turn-of-the-century statutes revoking or diminishing reservations. *See Hagen v. Utah*, 510 U.S. 399 (1994). There was no real change in right to possession and no change in occupancy by the members of the Native village. Throughout the process that ANCSA set in motion, Venetie has remained a remote community inhabited almost entirely by tribal members and exercising substantial powers of self-government.

2. ANCSA Was Intended to Deal Only With Land Tenure and Compensation, Not Tribal Governing Powers

It should be clear from the text of ANCSA that it was intended to resolve the land claims of Alaska Natives, nothing more, nothing less. Although embellished with

unprecedented complexities for selecting lands, distributing revenues, and corporate management of the settlement, the Act was simply Indian land claims legislation that replicated the results achieved by treaties, legislation, and judicial claims awards elsewhere in the country. It allowed Natives to retain a portion of their aboriginal territory, and to receive compensation for the lands where their title was extinguished. Thus ANCSA extinguished aboriginal title over most of the state – essential to developing Alaska resources and selection of lands promised to the State at statehood. Its provisions for retaining Native lands and receiving compensation were preceded by declarations that eschewed any creation or expansion of federal trusteeship but vested unprecedented control of lands in Natives and Native-controlled institutions. *See Cohen, supra* at 740-41.

ANCSA's land tenure and other provisions are consistent with congressional intent to enhance rather than terminate the self-governing powers of Alaska Natives. Contemporary expressions of federal policy by President Nixon (*see Special Message to the Congress on Indian Affairs*, [1970] Pub. Papers 564, July 8, 1970), as well as congressional statements at the time of enactment (*e.g.*, Statement of Alaska Congressman Nick Begich, 177 Cong. Rec. 46,789 (Dec. 14, 1971)) stress the importance of tribal self-determination, which would be enhanced, not destroyed, by release from oppressive federal bureaucratic controls. These contemporaneous expressions of congressional intent are reflected in subsequent congressional actions in other statutes reaffirming and supporting Alaska Native sovereignty. Furthermore, the express continuation of

federal services to Alaska Natives demonstrates congressional policy of maintaining its special protective relationship to tribes in that state. *See Cohen, supra* at 766, 769-70.

CONCLUSION

Venetie is now and has always been an isolated community of Alaska Natives. Its relationship with the federal government is longstanding, and includes federal protection and support for tribal self-government. At most, ANCSA contains a conversion of the former Venetie Reserve to village corporation title as part of a congressional scheme to resolve land claims and enable the Natives to achieve greater and more secure control over their ancestral territories. Thus, there was no clear expression of Congress to terminate Venetie's powers of tribal self-government as required by fundamental principles of Indian law.

Respectfully submitted,

RICHARD B. COLLINS
Associate Dean and
Professor of Law
DAVID H. GETCHES
Raphael J. Moses
Professor of Law
CHARLES F. WILKINSON
Moses Lasky
Professor of Law
School of Law
University of Colorado
Boulder, Colorado 80309-0401
303-492-7377

ROBERT N. CLINTON
Wiley B. Rutledge
Professor of Law
College of Law
University of Iowa
Iowa City, Iowa 52242
319-335-9032

CAROLE E. GOLDBERG*
Professor of Law
School of Law
University of California, Los Angeles
Los Angeles, California 90095
310-825-4429

RALPH W. JOHNSON
Professor of Law
School of Law
University of Washington
Seattle, Washington 98105
206-543-4938

MONROE E. PRICE
Professor of Law
Benjamin N. Cardozo
School of Law
Yeshiva University
New York, New York 10003
212-790-0402

RENNARD STRICKLAND
Dean and Professor of Law
School of Law
University of Oregon
Eugene, Oregon 97403
541-346-3853

* *Counsel of Record*